FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 25

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

VIRGINIA ELECTRIC AND POWER COMPANY.

No. 26

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF THE VIRGINIA ELECTRIC AND POWER COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF THE VIRGINIA ELECTRIC AND POWER COMPANY.

WM. EARLE WHITE,
PAUL E. HADLICK,
Counsel for respondent in No. 26.

INDEX

CITATIONS

Cases:

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 25

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

VIRGINIA ELECTRIC AND POWER COMPANY.

No. 26

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF THE VIRGINIA ELECTRIC AND POWER COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF THE VIRGINIA ELECTRIC AND POWER COMPANY.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 115 Fed. (2d), 414, and is printed at pages 1005 to 1019

of the record. The decision and order of the National Labor Relations Board can be found in 20 N. L. R. B., 911, and are printed on pages 952 to 980 of the record.

Jurisdiction.

The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and upon Section 10(e) and (f) of the National Labor Relations Act. The decrees of the Circuit Court of Appeals were entered on November 12, 1940 (R. 1019-1021) in two distinct proceedings for review of the Board's order above mentioned. The petition for writs of certiorari was filed February 12, 1941, and was granted March 31, 1941 (R. 1022-1023).

Questions Presented.

Three questions are presented by the brief for the National Labor Relations Board. In this brief only that part of the first question will be discussed relating to whether there is substantial evidence to support findings of the Board that the Virginia Electric and Power Company dominated, interfered with and supported the Independent Organization of Employees of Virginia Electric and Power Company.

Statement.

The findings of the Board with respect to The Independent Organization of Employees of Virginia Electric and Power Company (hereinafter referred to in this brief as I. O. E.) are printed in the record on pages 959 to 969. The statement in the brief for the Board, which attempts to summarize these findings, omits so much that is material to the consideration of the question presented that a complete statement of the facts has been deemed necessary.

For many years prior to 1937 there had been no labor organization representing employees of Virginia Electric

and Power Company in their dealings with the Company.

On April 12, 1937, this Court sustained the constitutionality of the National Labor Relations Act. On April 26, 1937, a bulletin was issued over the signature of the President of the Company stating the position of the Company regarding its future relations with its employees (Bd. Ex. 3, R. 35).

On May 11, 1937, in response to an unsigned notice prepared by Ruett, a large group of employees in the Norfolk Transportation Department met in the Company Y. M. C. A., in Norfolk, for the purpose of devising some means for making a request to the Company for a wage increase (R. p. 64-67; 94; 789). At this meeting another employee, Elliott, presented a prepared petition to be signed by the employees asking for an increase in wages, and improved working conditions (R. 66-67; 94-97). This petition was forwarded, through Mr. Bishop, to Mr. Throckmorton, Vice-President in charge of operations in Norfolk, who, in turn, sent it to Mr. Holtzclaw, President of the Company, in Richmond. The object of this petition was to obtain benefits for employees of the Norfolk Transportation group alone.

About the same time another petition for wage increases was presented by a few employees in the Norfolk Transportation Shops, and a group of about ten operators in the Richmond Transportation Department called on their superintendent asking for wage increases and some improved working conditions (R. 40-41; 52; 116; 256; 316; 334-35; 372; 432-433; 450; 808).

Following receipt of these requests and petitions, on May 24, 1937, the employees were called together by their local superintendents, and were asked to select representatives to attend one meeting in Richmond and one meeting in Norfolk where an important message would be delivered. There

was no compulsion involved and all groups were not approached. Most of the groups did send representatives to the meetings (R. 168-169; 373-375; 388-389; 390-391; 469; 477; 485; 495-496; 503-504; 515-516; 524-525; 554-555; 563-565; 582-584; 675; 695-696; 739-740; 781; 808).

To these two meetings Mr. Holtzclaw, in Richmond, and Mr. Throckmorton, in Norfolk, read a prepared statement (Bd. Ex. 4, R. 822).

After the reading of the statement, certain employees asked whether they had to join a labor union, and were told that they did not. To questions as to what sort of labor organization they should join, the answer was made that the Company had no suggestions to offer. Thereafter, the Company officials withdrew, as did a majority of the employees (R. 70; 99; 584-586; 741-790). In both Richmond and Norfolk, a small group remained, but took no action except to decide to report to their respective groups what had taken place, and find out what they wanted to do (R. 586-587; 704; 741). Thereafter, reports were made to meetings of the employees on Company premises, and frequently during working hours (R. 587-592; 808).

The events, thus far related, according to the contention of the Board in its brief, constitute the basis for the finding of domination and control of I. O. E. In its brief the Board says (p. 5):

> "By the speeches and through the method of calling and holding the meetings, the Company gave impetus to and assured the creation of an 'inside' organization."

The Board would have this Court sustain a presumption that whatever happened thereafter in the way of employee organization was in violation of the Wagner Act.

For this reason the events that followed must be borne in mind and considered in their chronological order and

setting. The record shows in detail how the I. O. E. came into being. The testimony is uncontradicted. The Board may have been unwilling to credit it, but there is no other evidence, so if the Board could find that the Company dominated or interfered with the formation of I. O. E., it must find the evidence here or nowhere.

The Board in its findings stated that "thereafter meetings of the steering committees were held on the premises of the respondent (Company) for the purpose of forming an independent, system-wide labor organization". The facts as to these meetings are, as follows:

It is admitted that following the May 24th meeting in Richmond and Norfolk, some meetings of employees were held on Company premises.

The meetings held prior to June 1, 1937, were, without exception, meetings called for the purpose of hearing reports of representatives who attended the meetings of May 24th. At these meetings, so far as the evidence shows, when any action was taken at all, it was taken to ascertain by various means what the employees in the group wanted to do. At Cove Street, in Norfolk, there was a secret ballot (R. 588-589). At the Service Building, in Richmond, apparently the men voted openly (R. 743). At Reeves Avenue, the Generating Plant, in Norfolk, the vote was open (R. 722-723). At Twelfth Street, the Generating Plant in Richmond, the ballot was not even taken on Company premises, but was a secret ballot collected at the homes of the employees (R. 782-783). The Gas Department and the shops are covered under the stipulation that the meetings there were similar to the meeting held at Cove Street (R. 808). All of these meetings had one thing in common—the employees everywhere voted their choice in favor of an independent organization as against C. I. O., A. F. of L., and no organization. They were given their choice, so far as

the evidence discloses, without any suggestion, interference, or supervision from the Company.

It is obvious that these meetings were not held "for the purpose of forming a system-wide independent organization". The Transportation employees in Norfolk voted to form the "Employees Association of Committees", under the leadership of Elliott (R. 804), and the Transportation employees in Richmond voted to form their own organization, and immediately rented their own quarters, and never held any further meetings on Company premises (R. 807).

There was no communication between employees in Norfolk and in Richmond until after June 1, 1937 (R. 715). All meetings up until that time were of groups of similarly employed men in a single division. Clearly no system-wide organization had been generally contemplated. On June 1st there was a meeting in Richmond, called by Holzbach, of representatives of various Richmond groups, and this meeting was held on Company premises, but not during working hours. Here, for the first time, a system-wide organization was discussed, and a committee was appointed to find out what employees in Norfolk were doing, and to get a lawyer to draw up a tentative constitution for a system-wide independent organization. No form of organization was determined (R. 745).

On June 1, 1937, representatives of various groups met in Norfolk on Company premises, but not during working hours, and heard Elliott explain his proposed "Employees Association of Committees". The meeting took no action except to direct that the proposal be printed and distributed to the representatives. No action was taken looking to the formation of any organization (R. 644-645).

On June 3rd a meeting of representatives from Norfolk and Richmond was held in Petersburg on Company premises, but not during working hours, at which nothing was agreed upon, except that a lawyer would be retained, to

draw up a constitution and by-laws. There was no definite idea of what sort of organization would be set up, or whether the groups would approve anything (R. 706-707; 766).

On June 7, 1937, a special meeting was called in Norfolk of employee representatives from each of the departments. This meeting was held in the Vepco Auditorium. Tatem was elected chairman in place of Nickerson (Bd. Ex. 20; R. 841). Elliott and other transportation representatives refused to vote, because they could only cast one ballot for the entire department instead of four ballots.

On June 9, 1937, representatives of different departments met in the Service Building, in Richmond, and discussed changes to the proposed constitution and by-laws, submitted by the attorney (R. 932).

On June 9, 1937, a special meeting was called in the Company Y. M. C. A., at the car barns on 18th Street, in Norfolk, of bus and street car operators. The meeting was attended by Underwood, from Richmond, at Tatem's request (R. 767-768; 802). The meeting decided to adopt Elliott's E. A. C. plan, and form a separate organization of transportation workers (R. 804). Applications were signed by 115 men (less than a majority) over a period of time ending June 11th or 12th, 1937 (R. 803).

On June 11, 1937, a second meeting was held in Norfolk by representatives of various groups sponsoring the system-wide organization (Int. Ex. 6; R. 889). The Norfolk transportation representatives refused to participate. The proposed constitution was discussed (R. 707-708).

There were no meetings on Company property by members or representatives, attempting to form I. O. E., subsequent to June 14, 1937 (R. 808).

The constitution, as originally prepared, was submitted to a joint meeting of committee members from Norfolk and Richmond, held at the American Legion Hall, in Rich-

mond. After extensive modification, it was adopted by those present (Int. Ex. 22; R. 915). This did not bind any employees to become members of the proposed organization. The men present merely agreed to take the constitution and by-laws, as finally approved, and present them to their fellow-employees. The I. O. E. was a plan that employees could accept if they wanted it; otherwise, it would amount to nothing. The constitution was the work of the representatives of employees, embodying the principles that those men believed accorded with the desires of their constituents (R. 746-747).

Copies of the constitution were mimeographed, and membership cards were printed. These were ready for distribution by June 17th, when the men in Richmond began to sign them (R. 748-749). Very little was done in Norfolk until June 22nd, when a mass meeting, attended by more than five hundred employees, was held at the Blair Junior High School. At this meeting the constitution and by-laws were explained to those present. Organizers of C. I. O. were present at this meeting, and the dramatic touch was provided by Elliott, who addressed the meeting, charged that the Company was fostering the I. O. E., and had offered him a job to quit fighting it. He concluded by announcing that he intended to join the C. I. O. (R. 598-599; Int. Ex. 8; R. 891-892).

By July 12th, 2000 employees had signed applications for membership in the independent organization (R. 725; 734; 1027). Transport Workers Union, a C. I. O. affiliate, had formed a Local by this time, composed of transportation workers in Norfolk (R. 114). International Brotherhood of Electrical Workers, an affiliate of A. F. of L., was active in soliciting members among electrical employees (R. 191). Neither of these membership drives was very successful, as no substantial number of employees ever joined either of these unions. On July 17th, the independent

group completed their organization, and formulated demands to be made on the Company (Int. Ex. 16-A to 16-F, incl.; R. 896-901), and on July 19th, these demands were presented and request for recognition was made (Bd. Ex. 5; R. 823-824). On July 30th, a meeting was held at which the Company recognized the Independent as exclusive bargaining agent of its employees upon being presented 2543 signed membership cards (R. 655). Thereafter, in negotiations covering three days, a contract was agreed upon by the committees, which was later ratified by the employees and by the Company. This agreement was executed August 5, 1937 (Bd. Ex. 19; R. 826-839). On July 20, 1937, Transport Workers Union had filed with the Regional Director of the National Labor Relations Board charges that Virginia Electric and Power Company was dominating and interfering with the formation of the independent association. On August 5th, representatives of the independent, with their counsel, met the Regional Director, in Norfolk, and at that time related to him the entire history of the association (R. 712-713). On August 26th, the Transport Workers Union filed additional charges, complaining of the contract executed August 5th. On February 23, 1938, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, which had attempted to organize transportation employees after Transport Workers Union withdrew, filed charges with the Regional Director of the National Labor Relations Board, making practically the same charges that had been filed by Transport Workers Union. Finally, on April 12th and 13th, International Brotherhood of Electrical Workers filed similar charges (R. 953). An investigator from the Board went through all the files and records of The Independent Organization of Employees, and talked to most of the employees who had been active in forming that organization

(R. 591). Photostatic copies were made of many letters and other papers, and the officers of the independent cooperated in every way to give him all available information.

Summary of Argument.

THE FINDING OF THE BOARD THAT VIRGINIA ELECTRIC AND POWER COMPANY DOMINATED AND INTERFERED WITH THE FORMATION AND ADMINISTRATION OF I. O. E. IS NOT BASED UPON SUBSTANTIAL EVIDENCE AND THE ORDER DISESTABLISHING I. O. E. IS A DENIAL TO THE EMPLOYEES OF VIRGINIA ELECTRIC AND POWER COMPANY OF THE RIGHT OF SELF-ORGANIZATION AND TO BARGAIN COLLECTIVELY THROUGH REPRESENTATIVES OF THEIR OWN CHOOSING

I. There is no substantial evidence to support the finding of the Board that the employer dominated and interfered with the formation and administration of I. O. E. The finding, therefore, is invalid. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Consolidated Edison Co.* v. *N. L. R. B.*, — U. S. 197; *N. L. R. B.* v. *Columbia Enameling & Stamping Co.*, 306 U. S. 292; *N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332; *The Chicago Junction case*, 264 U. S 258, at p. 265; *N. L. R. B.* v. *Thompson Products Co.*, 97 F. (2d) 13.

The Board has disregarded uncontradicted testimony in order to reach conclusions based on conjecture.

II. Since in this case there was no attempted conversion of a pre-existing company union, and since the plan of organization of I. O. E. permits no interference by outside agencies in its administration, and because of the fact that I. O. E. was the voluntary choice of ninety per cent of the eligible employees of the Company before it was recognized by the Company as a bargaining agency for them, and in view of the further fact that I. O. E. has actively functioned in an effective manner, it is not subject to the criticism made in the cases of *N. L. R. B.* v. *Newport News Shipbuilding &*

Drydock Co., 308 U. S. 241; *N. L. R. B.* v. *Penna. Greyhound Lines, Inc.*, 305 U. S. 261; *Washington, Va. & Md. Coach Co.* v. *N. L. R. B.*, 301 U. S. 142; *N. L. R. B.* v. *Bradford Dyeing Assn.*, 310 U. S. 318; *N. L. R. B.* v. *Link Belt Co.*, 311 U. S. 584; *International Assn. of Machinists* v. *N. L. R. B.*, 311 U. S. 72; *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *N. L. R. B.* v. *Falk Corp.*, 308 U. S. 453.

III. The Board failed to attach any significance to the conceded fact that since organization there has been no domination of I. O. E. or interference with its administration by the employer (R. 1012).

ARGUMENT.

I. The finding of the Board with respect to I. O. E. is, as follows (R. 968-969):

> "We find that the respondent has dominated and interfered with the formation and administration of the I. O. E., and has contributed support to it; that it has thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

It is this finding that is not based upon substantial evidence but instead is based upon unwarranted inferences in conflict with the uncontradicted, credible testimony in the record.

As a consequence of this invalid finding of fact, the order of the Board directed the Company to (R. 979) "(a) withdraw all recognition from The Independent Organization of Employees of the Virginia Electric and Power Company as the representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of employment, and completely disestablish The Independent Organization of Employees of the Vir-

ginia Electric and Power Company as such representative."

The Company was also ordered to cease and desist from (R. 978) "(b) in any manner giving effect to its contract heretofore described with the Independent Organization of Employees of the Virginia Electric and Power Company, or to an extension, renewal, modification or supplement thereof, or to any successor contract with the Independent Organization of Employees of the Virginia Electric and Power Company which may now be in force".

The Circuit Court of Appeals found (R. 1012-1013):

> "The Board's finding of domination and interference is based upon the fact that the association came into being as a result of the May 24th meetings and the address of the president, that the president at the meeting spoke of a wage increase to be negotiated by the organization, that the association was organized promptly and within a few weeks after these meetings, that meetings of employees looking to the organization of the association were held on the company's premises, that its bulletin boards were used for posting notices of these meetings and its telephone between Richmond and Norfolk used in connection therewith, and that persons were solicited for membership in the association on the company's premises. We do not think, however, that any of these circumstances, or all of them taken together, when viewed, as they must be, in the light of the surrounding circumstances shown by the record, constitute any substantial evidence of the domination or interference forbidden by the Act."

This Court in other administrative law cases, as well as under the Labor Act, has repeatedly asserted that the findings of fact of such quasi-judicial bodies are "conclusive, but only if supported by evidence". *N. L. R. B.* v. *Jones & Laughlin Steel Corp., The Chicago Junction* case, 264 U. S. 258, at page 265.

The evidence required for such findings of fact has been described by this Court as follows:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
> *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, at p. 229.

Again, in the same opinion, this Court says:

> "But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."
> *Consolidated Edison Co.* v. *N. L. R. B., supra,* at p. 230.

This was followed by the case of *N. L. R. B.* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, at pages 299, 300, where the court, after quoting from the *Consolidated Edison* case, *supra,* added:

> "• • • and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

This Court, in the *Consolidated Edison* case, *supra,* cited the case of *N. L. R. B.* v. *Thompson Products, Inc.*, 97 F. (2d), 13, at page 15. The language used by the Circuit Court in that case is as follows:

> "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth, and, unless all of it is weighed in its totality, errors will result and great injustices be wrought."

With the principles of law above enunciated in mind it is impossible to find in the evidence any foundation for the con-

clusion reached by the Board that "the I. O. E. (R. 967) owes its existence and its form to activities of the respondent." Still less evidence is there to justify the statement of the Board that (R. 965) "the respondent's action converted the delegates isolated from their constituents and under the immediate influence of the officials, into virtual representatives of the employer among the employees who had elected them".

Not only is there a lack of substantial evidence to substantiate the conclusion reached, but there was uncontradicted testimony that necessarily leads to an opposite conclusion.

The record leaves beyond question the fact that at the meetings referred to, held a few days after the two meetings of May 24th, the employees were given the right to express their preference as to whether they wanted no organization, the C. I. O., the A. F. of L., or an independent organization (R. 587, R. 782-783, R. 787-788, R. 808). These meetings were restricted to non-supervisory employees; there is no claim that any supervisory officials were present at these meetings. The evidence with respect to the meeting of the Line Department in Norfolk is very full (R. 587-592, Int. Ex. 3-A to 3-G, incl., R. 888-889, R. 676-677, R. 696-697, R. 185-186). In that case the choice of the men was ascertained by secret ballot, and then the representative chosen was authorized in writing to represent the employees.

The Board inferred that the vote taken at these meetings in favor of forming an unaffiliated organization was "pursuant to the suggestions contained in the address of May 24th". This inference is evidently coupled with another inference that those who attended the meetings of May 24th became "virtual representatives of the employer among the employees who had elected them". Inferences must be based on fact. The only facts presented by the Board as the basis for these inferences are the text of the address

of May 24th, the mechanics of the meetings at which the address was delivered, and the subsequent vote taken by the employees in favor of forming an unaffiliated organization to represent them.

There were other facts in the record, not mentioned by the Board, but which were not contradicted, and, therefore, must be considered. One of these is that the representatives to the meetings of May 24th were chosen by the men themselves and not selected or suggested by their supervisors (R. 185; R. 582-584; R. 675; R. 695-696; R. 739-740; R. 781). There is no evidence that any supervisory official had any connection with the selection of these representatives, and no scintilla of evidence that the Company had any way of knowing in advance who would be sent to the meetings.

Another fact is that records were kept of these meetings of the employees, and these records definitely show what took place there. No pressure was put on the employees to take any action one way or the other. In most instances the employees had the opportunity of expressing their preference by secret ballot. It is hard to imagine how more safeguards could be thrown around a free choice by the employees.

Still another fact not mentioned by the Board is that a large number of witnesses testified as to what took place at these meetings, and were subject to cross-examination by attorneys for the Board. None of these witnesses testified that the result of the votes taken at those meetings was "pursuant to the suggestions contained in the address of May 24". Fourteen men who attended the meetings of May 24, testified, and none of them indicated that they had become a virtual representative of the Company. Of these fourteen men, the Board put on two witnesses, one of them Elliott, a former employee who at the time of the hearing before the Trial Examiner was an organizer for the A. F. of

L., and the other, Ruett, an employee who had been discharged by the Company, and who, at the time of the hearing was plaintiff in a suit against the Company. Both of these men testified as to what took place at the Richmond meeting. I. O. E. presented five witnesses who attended this meeting, and the Trial Examiner called one. Somewhere in the testimony of these eight witnesses the Board must have found evidence to justify its conclusion that the men who attended this meeting were converted into "virtual representatives of the employer among the employees who had elected them."

Robert E. Elliott testified (R. 100) that after the Company officials left the meeting, he did not remain to participate in the meeting of employees that then took place, but instead returned to Norfolk. Elliott testified (R. 101) that he wanted to await action on the petition of the Norfolk Bus and Rail Operators before taking any further action. Evidently, he was not converted.

Ruett testified that he returned to Norfolk and participated in the formation of the Employees Association of Committees (R. 71-72), although he left it up to Hough and Elliott to work out the organization. Certainly, he was not a very enthusiastic convert. The Norfolk Transportation employees voted to give Elliott's Employees Association of Committees a thirty-day trial, to negotiate with the Company, and, if unsuccessful, to take a vote to join either the C. I. O. or the A. F. of L. (R. 180). Ruett's testimony shows such confusion of recollection, and he contradicts himself so frequently, that it is difficult to accept any of it with certainty, but nowhere does Mr. Ruett intimate that the address delivered, or the mechanics of the Richmond meeting, made him, in any way, a representative of the Company among the employees.

M. D. Hough accompanied Elliott and Ruett to the Richmond meeting. While his recollection of the discussion

that took place after the meeting is different from that of Elliott and Ruett (R. 800-801), it is generally admitted that he was active, along with Elliott, in promoting the Employees Association of Committees, which was to act independently of the Steering Committee headed by Tatem, and he seconded Elliott's efforts to negotiate separately with the Company officials. If the Company was dominating the formation of I. O. E., Mr. Hough was a poor company representative.

A. E. Bertollett, who heard the address by Mr. Holtzclaw, testified (R. 740-741) that he heard no statement made that indicated any preference as to what sort of union employees should join, nor did he receive any impression that the Company thought any organization should be formed. Bertollett remained after the Company officials left, and participated in the meeting, which decided that delegates should report the position of the Company to their respective constituents, and at some subsequent time get together again, and see what the reaction had been upon the employees (R. 742). When Bertollett reported to his group, a vote was taken, at which the men expressed their preference for C. I. O., A. F. of L., an independent organization, or no organization (R. 743). A company representative would logically have avoided any such expression of choice.

Walter Holzbach testified (R. 790) that no suggestion was made as to the particular kind of organization preferred by the Company. He was elected chairman of the meeting of the employees that immediately followed the withdrawal of the Company officials. He called a meeting of the employees in the Service Building, in Richmond, and reported to them what had happened at the meeting of May 24th. His influence among his fellow employees was not sufficient to elect him their representative on the steering committee. They chose Staughton instead (Int. Ex. 33;

R. 929-930). If he was a representative of the employer, Mr. Holzbach seems to have been a failure.

George Roberson testified (R. 781-782) that the impression he drew from the address of May 24th was "that we could join C. I. O., we could join the A. F. of L., or we didn't have to have any organization; in other words, it was our baby". Following the address, he reported to his group and then he had some ballots made up by his brother, who worked for the C. & O. Railway, which he distributed to his men at their homes, on which ballots they were asked to express their preference for C. I. O., A. F. of L., an independent organization, or no organization. The results were (R. 783) C. I. O., 22; A. F. of L., 1; 92 or 94 for an independent organization, and 6, 7 or 9 for no organization. There is no evidence here showing the conversion of Roberson into a Company representative.

George Colonies also attended the meeting of May 24th, and it was stipulated (R. 787) that he corroborated the testimony of the witness Roberson.

L. D. Edwards attended the meeting, and his evidence was stipulated (R. 808-809). The record is silent as to what impression Edwards received at the meeting. There is no basis here for any finding that he was converted at the meeting.

As to the Norfolk meeting of May 24th, all of the testimony of the employees came from witnesses presented by I. O. E. Six men testified, W. W. Faust, a lineman, P. D. Brown, a cable splicer, W. O. Morris, a lineman, and a Vice-President of the I. B. E. W. Local, D. M. Tatem and N. R. Jones, switchboard operators, and C. G. Steele, an electrician. The testimony of Faust presents fairly the facts to which all testified. He testified (R. 586) that he received no impression that the Company favored any particular line of action on the part of its employees with respect to labor organization or affiliation, but only that the Company was willing to cooperate

with any organiza ion. The only action taken after the Company officials le"t the meeting was to adopt a motion by Tatem that those present take back to their respective groups, the substance of the meeting, and see what they wanted to do about it. Thereafter, at Cove Street, the men in the Distribution Department, by secret ballot, voted to form an independent organization. Twenty (20) men voted for C. I. O., 6 for outside help, 126 for collective bargaining, and 1 for "just anything". At this meeting Staunton, Davis and some others were active participants in favor of outside affiliation (R. 588-591). If the Company expected Faust to be a representative among the employees to help form an inside union, acceptable to it, then it appears Faust was not sufficiently converted. He joined Davis and Staunton in requesting Latham, the I. B. E. W. organizer, to come to Norfolk, and joined I. B. E. W. (R. 192; R. 669-67). This action was taken at the very height of the campaign between I. O. E. and I. B. E. W. for members. Brown, who also attended the meeting of May 24th, and who was charged by Davis, Judge and Harrell with being a Company representative, was ineligible to serve as a representative under the provisions of the constitution and by-laws of I. O. E., and, consequently, dropped out of the picture after that time (R. 684-685). Morris, from the Portsmouth Line Department, was authorized by his group to vote for anything the Norfolk Line Department wanted (R. 696). Tatem, Jones and Steele, who worked in the Generating Department, were only three of about 18 employees from that department who attended the meeting (R. 704; R. 721-733). On May 27th, Jones, at the suggestion of fellow employees, called a meeting to report on the May 24th address, and to ascertain the wishes of his group. At this meeting, a majority of the Production Operating employees were present, and voted unanimously for an independent organization (R. 722-723).

Without going further into a detailed statement of the facts, it is certainly obvious that there is no evidence of any kind in the record to support the finding of the Board that the address of May 24, 1937, and the way this meeting of the employees was staged, had any influence on the choice of the employees of the Company to form the I. O. E.

Even though the members of the Board are to be considered as specialized and experienced experts in their appraisal of the evidence, there must be some evidence to appraise. The Board is not at liberty arbitrarily to disregard uncontradicted facts and substitute inferences as a basis of its conclusions.

But assuming for the argument that the decision of the employees at these initial meetings to form an unaffiliated organization was influenced by the address of May 24th, it should not be overlooked that the vote of the employees at these meetings was not final and did not bring any organization into existence. The adoption of the constitution and by-laws of I. O. E., at the meeting of June 15, 1937, did not bind any employee. In order to represent the employees of Virginia Electric and Power Company, I. O. E. had to be designated by each employee in a written application for membership, and this, of course, necessitated a membership campaign. The Board finds that this campaign started on June 17th and continued for about three weeks (R. 966). As a matter of fact, the campaign was successfully completed by July 2nd, when the primary for nominating representatives was held; 1912 employees participated (R. 1027). It was conducted entirely by the members of the organization themselves. The Board does not point to any participation in this membership campaign by supervisory employees of the Company; it merely mentions certain circumstances on which it bases its finding of domination and interference. The claim upon which the Board seems to rely most is that there was widespread solicitation on Com-

pany premises by those seeking to organize I. O. E. There is no evidence to justify the expression of the Board that such solicitation was "widespread". Assuming that the Board has a right to refuse to credit the testimony of the large number of witnesses who testified that there was very little solicitation on Company premises, yet there must be something in the record that a reasonable mind might accept as adequate to support a finding such as the Board has made. With the exception of the witnesses, Ruett, Harrell and Judge, no witness testified that there was any solicitation on Company premises prior to August 5, 1937. There was some evidence that after August 5th, and within the ninety-day period given employees to join I. O. E. under the provisions of the contract, there was some solicitation on Company premises, but I. O. E. was then organized, recognized and functioning.

Ruett testified (R. 77) that he signed men up in I. O. E. while both he and they were working but not when foremen or supervisors were present. He does not state that he signed very many application cards on Company premises or while men were at work, and his testimony does not justify use of the term "widespread solicitation".

Johnny Judge did testify that it was the general practice but could give only three instances (R. 193-197). Harrell testified (R. 209) that he was solicited on Company property but signed up out in the street. Even Staunton, the man who preferred to be fired rather than join the I. O. E., testified (R. 174-176) that he was unwilling to say whether solicitation he saw on Company premises took place before or after August 5th. Certainly there appears no justification in the evidence for the Board's statement that there was widespread solicitation on Company premises.

But even if there was solicitation by I. O. E. campaigners on Company premises, without objection from the Company, this has no significance if the same form of solicita-

tion was being carried on by the representatives of other unions without objection from the Company. Six witnesses testified to this: Tatem (R. 710), Crockett (R. 731-732), Gunter (R. 732), Brown (R. 684), Morris (R. 700), and Wallace (R. 730-731). All testified to solicitation during working hours as well as on Company premises by those conducting the membership campaign of the I. B. E. W. There was no denial of this. The Board in its brief attempts to meet this with the statement that there was not as much solicitation for I. B. E. W. as for I. O. E. This begs the question. The important issue is whether favors were shown I. O. E. that were denied other competing organizations. The evidence is clear that the Company accorded the same treatment to all.

There is no evidence in the record that the Company entered into this contest for members in any way whatever. Transport Workers Union was attempting to organize the bus and rail operators in Norfolk. I. B. E. W. was attempting to organize the electrical workers in both Richmond and Norfolk. At the very height of the membership campaign, on June 24, 1937, the Company issued a bulletin (Res. Ex. 7; R. 860-861), stating:

> "Employees of Virginia Electric and Power Company have a right to self-organization, to form, join or assist labor organizations, and to bargain collectively through representatives of their own choosing, and the Company has not sought, and does not seek, to dominate or interfere with employees in the exercise of any of their rights, individually or collectively."

The Board does not mention this bulletin, but there is no question as to the fact that it was issued, nor can its significance be disregarded.

It is perfectly clear, therefore, that there is no evidence of rational probative value to support the conclusion of the Board (R. 968) that "a majority of the employees

had signed as a result of widespread solicitation on the premises of the respondent throughout the entire system".

The other circumstances relied upon by the Board to sustain its finding of Company favoritism are as follows:

(1.) Bulletin boards of the Company were used for posting notices of meetings.

(2.) Telephone connections of the Company were used by committeemen to communicate with each other.

(3.) The I. O. E. was completely organized and had a majority of the employees as members within six weeks after the meeting of May 24th.

The Circuit Court in its opinion (R. 1013) calls attention to the fact that only one instance of the use of a Company bulletin board is established, and that the case where Holzbach posted a notice of his meeting of May 26th (R. 795-796).

The use of telephones by Tatem, Jones and Underwood can certainly be no basis of a finding of Company support or domination. These men had access to the telephone in regular line of duty. Their use of the line is without significance unless it indicated Company approval of what they were doing. The Circuit Court of Appeals disposes of this contention with the flat statement (R. 1016):

> "The use of the company telephone in communications between employees in Richmond and Norfolk was without the knowledge of supervisory employees."

The other circumstance relied upon by the Board was the asserted speed with which the employees set up their independent organization. The inference is that this could not have been accomplished without Company approval. The court below held this inference to have no basis in facts which appear of record (R. 1015). What was done and how it was done appears in great detail. The men who led

the movement to set up the independent union and those who opposed it all testified. The Board had made an exhaustive examination of the minutes and records of the independent organization before the hearing was held. It is significant that no facts are pointed out to support the conclusion that the Company assisted or encouraged the organization in any way or that those opposing the organization were made to feel that the Company disapproved their actions. The position of the Board is that it is incredible that laboring men, free from employer interference, would voluntarily choose an unaffiliated labor organization when granted an opportunity of joining unions affiiliated with A. F. of L. or C. I. O. The right of employees to form, join or support an "inside" union apparently belongs only in the realm of theory and will never be exercised. The fact that employees promptly and almost unanimously choose an "inside" union is the basis of a Board inference of Company domination of interference. According to such reasoning this Court stated an impossibility when it said (*National Labor Relations Board* v. *Link Belt Co.*, 311 U. S. 584):

> "An 'inside' union, as well as an 'outside' union may be the product of the right of the employees to self-organization and to collective bargaining 'through representatives of their own choosing' guaranteed by Section 7 of the Act."

If the fact that employees form their own collective bargaining agency and act with efficiency and dispatch is to be the basis of an inference of Company sponsorship and interference, then the door is effectively closed to the organization of "inside" unions. Any degree of unanimity in itself will be a suspicious circumstance. The better the inside union works and the more support it has from the employees it represents, the more evidence it will furnish the Board that subtle influences are at work by means of

which the employer is interfering with the freedom of choice of the employees.

II. I. O. E. is an independent bargaining agency and its plan of organization is such that no interference or domination by the employer is possible. It thus differs from cases previously before this Court because such condemned plans of organization were either (a) conversions of pre-existing company-dominated unions or (b) were subject to interference or veto by the Company, or (c) failed to meet the necessary requirements of a bargaining agency; such as in the cases of:

N. L. R. B. v. *Newport News Shipbuilding & Drydock Co.*, 308 U. S. 241;

N. L. R. B. v. *Penna. Greyhound Lines, Inc.*, 303 U. S. 261;

N. L. R. B. v. *Bradford Dyeing Association*, 310 U. S. 318;

N. L. R. B. v. *Link Belt Co.*, 311 U. S. 584;

International Assn. of Machinists v. *N. L. R. B.*, 311 U. S. 72;

N. L. R. B. v. *Falk Corp.*, 308 U. S. 453;

N. L. R. B. v. *Fansteel Metallurgical Corp.*, 306 U. S. 240.

The effect of the order of the Board is to nullify the wishes of those employees who have selected I. O. E. as their bargaining agent and who have admittedly gained substantial benefits from its efforts.

The I. O. E. is an independent bargaining agent. Here, as in the court below, there is no contention to the contrary. The opinion of the Circuit Court of Appeals states (R. 1012):

> "There is no contention that there is anything objectionable in the constitution or by-laws of the association or in the trade agreement arrived at with the

company or in the manner in which it was negotiated; and it is not contended that the company contributes any support to the association or dominates it in any way, or in any way interferes with the control exercised over it by its members."

On the basis of the evidence in this case no contrary contention could be made. The constitution and by-laws of I. O. E. assure the complete control of that organization by its members. Amendments of the constitution and by-laws depend on the will of its members alone. Representatives are nominated and elected by secret ballot, and these elections are supervised by duly appointed members of the organization (Bd. Ex. 36; R. 844-855). Meetings of members are held regularly, and minutes are kept of all meetings (R. 576-577; 581). A large number of these minutes are filed as a part of the record (Int. Ex. 19-A to 19-S, incl., R. 903-913). Union offices are maintained in Norfolk and Richmond with meetings held in each place (R. 580-581). Each member of the organization gets annually an itemized statement of all its receipts and disbursements certified by an independent accountant (R. 580). The contract between I. O. E. and the Company, in addition to the pay increases, gained other advantages such as time and one-half for overtime, the limitation of the work week, and a grievance adjustment procedure (Bd. Ex. 9; R. 826-839). After execution of the contract, I. O. E. remained active in adjusting grievances, seeking pay adjustments, and in April, 1938, was engaged in trying to negotiate amendments to the contract (R. 628-629). In short, I. O. E. is an active labor organization, entirely free from employer domination, interference or support.

In the cases of *N. L. R. B.* v. *Newport News Shipbuilding & Drydock Co., supra, N. L. R. B.* v. *Penna. Greyhound Lines, Inc., supra, N. L. R. B.* v. *Link Belt Co., supra, International Assn. of Machinists* v. *N. L. R. B., supra,* and

N. L. R. B. v. *Falk Corp., supra*, there was an attempted conversion of a pre-existing company-dominated union, and this Court stressed the necessity for "wiping the slate clean and affording the employees an opportunity to start afresh in organizing for the adjustment of their relations with the employer". (*N. L. R. B.* v. *Newport News Shipbuilding & Drydock Co., supra.)*

In the case of I. O. E., there was no "old" company association or union involved, and no group of employees accustomed to dealing with the management in the company union method. There was nothing on the slate to be wiped off.

In this case there was no participation by supervisory employees in devising the plan of organization or soliciting membership therein as was the case in *N. L. R. B.* v. *Bradford Dyeing Assn., supra.*

In this case there was no hasty recognition of the organization by the employer on the unsupported word of a few employees as in the case of *N. L. R. B.* v. *Falk Corp., supra.*

The Company in this case has no "veto" power, such as was a factor in the case of *Newport News Shipbuilding & Drydock Co., supra.*

The Board seeks to sustain its position by claiming an almost exact similarity between the present case and the case of *N. L. R. B.* v. *Link Belt Co.*, 311 U. S., 584. In the *Link Belt* case, this Court recited "the whole congeries of facts before the Board", which sustained its findings. The circumstances in that case which are wholly absent from the present case are:

(a) A previous company-dominated union of employees.

(b) The maintenance by the employer of the previous company-dominated union until completion of the membership drive for the new union.

(c) The prominence of the company-dominated union representatives in the membership drive.

(d) The support given the membership drive by the supervisory staff, including the active solicitation of memberships by company foremen and the signing of applications by foremen for illiterate workmen.

(e) The action of the employer in delaying the announcement of its attitude to the employees and to the supervisory staff until after the new independent organization had secured a majority at the plant.

In the case of the I. O. E. there was no previous organization at all, and, consequently, no employee agency that the company could use to establish a new organization to its liking. There was no participation by supervisory employees in the membership drive for I. O. E., and there were no employees who, by reason of their past association with any organization, could be regarded by their fellow employees as qualified to express the attitude of the Company toward the proposed organization.

The Company in this case expressed its attitude of impartiality not only in the address of May 24th, but particularly in the bulletin issued on June 24th, in which it expressly stated (R. 861):

> "The Company has not sought and does not seek to dominate or interfere with employees in the exercise of any of their rights, individually or collectively."

This bulletin was issued within two days after the membership drive had started in Norfolk and within a week of the time the membership drive had started in Richmond, and before I. O. E. had been joined by anything like a majority of employees of the Company. It was issued at a time when Transport Workers Union had organized a

Local among transportation employees in Norfolk, and I. B. E. W. had a full-time organizer attempting to sign up employees of the electrical department. In short, the membership campaign of I. O. E. was conducted against the competition of both C. I. O. and A. F. of L., after the Company had openly expressed its attitude of impartiality and after it had specifically instructed all of its supervisory personnel on May 25, 1937, that no interference with the employees would be permitted.

In the *Link Belt* case, *supra*, the circumstances which this Court regarded as significant are summed up in the following quotation from the opinion (at p. 597):

> "The Board had the right to believe that the maintenance of the company union down to the date when Independent's membership drive was completed was not a mere coincidence. The circumstantial evidence makes credible the finding that complete freedom of choice on the part of the employees was effectively forestalled by maintenance of the company union by the employer until its abandonment would coincide with the recognition of Independent. The declared hostility towards an 'outside' union, the long practice of industrial espionage, the quick recognition of Independent, the support given Independent's membership drive by some of the supervisory staff, the prominence of company union representatives in that drive, the failure of the employer to wipe the slate clean and announce that the employees had a free choice, the belated instructions to the supervisory staff not to interfere—all corroborated the conclusion that the employer facilitated and aided the substitution of the union which it preferred for its old company union."

None of these circumstances are present in this case although the Board seeks to establish the similarity of the two cases by referring to the following facts:

(a) The statement of Holtzclaw in 1933 that organization of employees was deemed unnecessary.

(b) The activities of Bishop and [illegible] Transportation Department.

(c) The employment by Bishop's Department of a so-called labor spy.

(d) The discharge of Everhard M. Mann on June 1, 1937.

The Board in its brief (p. 12) contends that the lower court "agreed with the Board that the company had been *hostile* to outside unions (R. 1008)". But the court below used the word "opposed" instead of "hostile". It must not be overlooked that the court also held that such opposition was prior to the enactment of the National Labor Relations Act (R. 1008).

As to the events in controversy the lower court stated (R. 1013-1014):

> "It should be noted that, in the address of the president, the right of the employees to select representatives of their own choosing was made abundantly clear, and that the duty of the company and its officers to refrain from interference was properly emphasized; and we see nothing either in the address or in the surrounding circumstances from which the employees could have gained any contrary impression. *No hostility* towards any outside union was manifested." (Italics supplied.)

In the next instance the Board cites the lower court as agreeing with the Board (Brief, p. 12):

> "That, in violation of the Act, Superintendent Bishop had interrogated employees concerning union organization and activities."

Whereas, what the Court actually said was:

"that its superintendent of transportation in Norfolk had, in 1936, been guilty of [illegible]"

But the Court significantly added:

> "The questioning of employees by Bishop in 1936, however, is not a matter of sufficient importance, when standing alone, to justify the granting of a cease and desist order here, in view of the fact that any effect of such questioning had, unquestionably, been dissipated by the Company's action in 1937 and the formation of the association as a bargaining agency for employees" (R. 1019).

The failure of the Board to properly appreciate the facts in this case is clearly shown by the undue weight it gives to the activities of Bishop and Edwards. Such activities could not have had the effect claimed by the Board so far as the formation of I. O. E. is concerned, because Bishop was merely the superintendent of the Norfolk bus and rail operators, and had no supervision over or contact with any other employees of the Company. Actions that might have had significance, where all employees worked in a single plant, lose all probative value when it is sought to use them as a basis of a finding that they influenced the action of employees working in a different plant in a distant city. The attempt of the Board to use the activity of Bishop and Edwards as the basis of an inference that it affected the action of employees of Virginia Electric and Power Company, in Richmond, Petersburg, Fredericksburg, Virginia, and in Roanoke Rapids, North Carolina, must fail because the reasonable mind refuses to regard such facts as adequate to support such an inference.

Nowhere in the findings of fact of the Board is the statement made that the discharge of Everhard M. Mann had

any connection with the choice of the employees in joining I. O. E. It is stated (R. 970) that Mann was discharged for union activity, but nowhere does the Board hold that such discharge actually affected in any way the action of other employees. Now it is claimed that the discharge of Mann was one of the important factors upon which the Board relied. What has been said with respect to the alleged activity of Bishop and Edwards applies equally to the discharge of Mann. It does not supply evidence that has probative value on the question of what influenced the choice of 2500 employees to join I. O. E.

As to the activities of one Walters, who, it is claimed, was a labor spy, employed in the Norfolk Transportation Department, in the absence of any evidence that his existence was known to, or even suspected by, any employees of the company, and in view of the fact that he died before the address of May 24, 1937, it is impossible that he could have had any effect upon the choice of the employees to join I. O. E.

It, therefore, is clear that the absence from this case of all the significant circumstances related by this Court in the *Link Belt* case, *supra*, as sufficient support for the finding of the Board in that case that employee choice had been improperly affected by the attitude of the employer, requires the conclusion that such a finding in this case is not supported by substantial evidence.

I. O. E. was voluntarily designated by ninety per cent of all employees of the Virginia Electric and Power Company as their representative for collective bargaining, before it was recognized by the Company. This was not true of the organizations which were the subject of controversy in the cases of *N. L. R. B.* v. *Bradford Dyeing Assn.*, 310 U. S. 318; *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; and *N. L. R. B.* v. *Falk Corp.*, 308 U. S. 453, at p. 461.

As a matter of fact, at the time the committee from the I. O. E. first met the committee from the Company 2543 applications for membership were exhibited (R. 655). Prior to the meeting, on July 27, 1937, a statement furnished the Company showed 2429 members (Res. Ex. 13-R; R. 873-874). The total eligible membership was only about 2800.

Upon such a state of facts the company was required to recognize the I. O. E. as the bargaining agency of its employees. It had to consider the requests of I. O. E. for a closed shop as representing the wishes of ninety per cent of its employees. There was no hasty recognition of I. O. E. by the management.

In the case of *N. L. R. B.* v. *Bradford Dyeing Assn., supra,* the first meeting of employees was held in the office of the President on April 6th, and recognition was granted five days later, on April 11th, before there had been any election of officers and on the written statement of a temporary committee that it represented fifty-one per cent of the employees.

The Board has cited the case of *National Labor Relations Board* v. *Fansteel Metallurgical Corp., supra,* in support of its position that there is substantial evidence in this case that the Company dominated, interfered with and supported the I. O. E. This case will be recalled as one of national importance because this Court therein passed upon the legality of sit-down strikes. The facts in that case and in the case now before the Court are in no way similar. In the *Fansteel* case the employer refused to recognize or bargain with the Amalgamated Association of Iron, Steel and Tin Workers of North America which represented a majority of the shop employees. A sit-down strike ensued, and many of the strikers were discharged. This was followed by the re-opening of the plant and the quick organization on company premises of an independent union known as Rare Metal Workers of America, Local No. 1. Most of

the employees who formed this organization were either old employees who had been solicited to return to work on condition that they give up their outside union affiliation or new employees who were hired to take the place of men out on strike. This Court in its opinion (p. 250) states that the employer accorded to the independent union "various forms of support". In the present case there had been no antecedent refusal by the Company to bargain with an outside union, nor was there any national union claiming to represent a majority of the employees. There was no strike of any kind nor any replacement of old employees who belonged to national labor unions; in short, the atmosphere in the present case was totally different from that in the *Fansteel* case. The principal difference is that in the *Fansteel* case the Company refused to recognize an outside union which clearly represented a majority of its employees but did cooperate with an inside union. The two cases are notable chiefly for the dissimilarity of their facts.

In the case of *N. L. R. B.* v. *Falk Corp., supra*, three employees conferred with an attorney suggested to them by the company president, proceeded to incorporate a union, and notified the company that it was ready to bargain for some four hundred employees. Three days later the company recognized the so-called independent union as the bargaining unit for all employees upon the statement of the three incorporators, without proof that they represented a majority of the employees.

The Board has been critical throughout of the speed with which I. O. E. was formed, that "agreement was quickly reached" on a contract, and that the ultimate contract arrived at contained provisions "for a closed shop, check-off and wage increase". Yet the very absence of these things has been used as an argument by the Board in other cases to sustain an assumption of company domination. The Board overlooks the testimony in the record of the many

hours, night after night, that were put in by the employees to perfect an organization that would give them all the protection provided by the Wagner Act at one-fourth the cost were they to have gone the national union route.

III. The Board failed to attach any significance to the conceded fact that since organization there has been no domination of I. O. E. or interference with its administration by the employer (R. 1012).

The court below stated (R. 1012):

> "There is no contention that there is anything objectionable in the constitution or by-laws of the association or in the trade agreement arrived at with the company or in the manner in which it was negotiated; and it is not contended that the company contributes any support to the association or dominates it in any way or in any way interferes with the control exercised over it by its members."

There is no explanation offered of how an undominated union can be organized by Company domination. If the Company dominated the formation of I. O. E., then at what point in the space of less than a month, did I. O. E. cut the ap on strings? It is not contended that on July 19th, when I. O. E. formulated its demands at Ocean View, that the Company was interfering with or dominating the organization. It would strain credulity to say that any Company representative would have had a hand in asking for as much as I. O. E. demanded at that time or that any Company-dominated union would have held out for the terms finally written in the contract executed August 5th.

Certainly, it would seem that Company interference or domination would have cropped out in the period from August 5, 1937, to May, 1938. The Board had free access to all the records of I. O. E., including the minutes of all its meetings for weeks prior to the hearing before the Trial Examiner. Most of its representatives had been inter-

viewed by agents of the National Labor Relations Board. In spite of this, no evidence of Company domination or interference in the administration of I. O. E. was introduced, and no contention was made in the court below, and none is made in this Court, to the effect that there is any Company domination of or interference with I. O. E.

A peculiar feature of the attitude of the Board in this case has been its apparent willingness to override the wishes and rights of a vast majority of employees when it has received no complaints from the employees themselves. The Board seeks to justify the order of disestablishment because it claims that this is necessary to effectuate the purposes of the National Labor Relations Act. The primary purpose of that Act is expressed in Section 7 that guarantees certain rights to employees. The Board was set up for the purpose of protecting those rights. Brushing aside the technical position of the parties, the actual contest in this case is between the organizers of national Labor unions who were unable to persuade the employees of Virginia Electric and Power Company to join them, on one side, and the vast majority of the employees of Virginia Electric and Power Company who set up the I. O. E., on the other side. Those men are interested in the preservation of the pay increases, the overtime payments, the limitation of the work day and work week, the grievance procedure and the other advantages gained in their contract.

The organization is ordered to be disestablished and its contract invalidated in spite of the wishes of ninety per cent of the employees of the Company who chose it for their bargaining agent, because the Labor Board infers that the Company by some subtle and unexplained influence undermined the will of its employees and misled them into forming an independent organization. The Board seeks to substitute its judgment in this case for that of the employees themselves. Because it believes the choice these

employees made is unwise, it infers that such choice must, in some unexplained manner, have been corrupted by the employer. The choice of a bargaining agent was for the employees and not for the Board. Since the agency chosen was organically sound and comes within all the requirements of the Act, the order of the Board disestablishing I. O. E. violates Section 7 of the Act that guarantees employees "the right of self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection". (29 *U. S. C. A.*, 157.)

Summary and Conclusion.

The fundamental issue in this case is whether facts have been established that furnish a lawful foundation for the findings of the Board. There are no principles applied by the court below that have not already received the approval of this Court. The issue was whether there was substantial evidence to support the finding of the Board that the Company had dominated and interfered with the formation and administration of the I. O. E. That court followed the definition of domination and interference given by this Court in the case of *T. & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548, 568. It applied to the evidence the test of substantial evidence in accordance with the principles laid down by this Court in the case of *Consolidated Edison Company of New York* v. *National Labor Relations Board*, 305 U. S. 197, 299). Noting the absence of any evidence of any manifestation of hostility by the Company towards any outside unions or any suggestion that "the company through its supervisory employees, or otherwise, aided or assisted in any way" in the organization of I. O. E., the court below found that there was no substantial evidence to support the finding of the Board.

The Board has brought this case before this Court, and the burden is upon the Board to establish any error committed by the Circuit Court of Appeals.

It is respectfully submitted that no error has been established, and that the decrees of the Circuit Court of Appeals should be affirmed.

THE INDEPENDENT ORGANIZATION OF EMPLOYEES
OF VIRGINIA ELECTRIC AND POWER COMPANY,
By WM. EARLE WHITE,
PAUL E. HADLICK,
Counsel.

(7202)

SUPREME COURT OF THE UNITED STATES.

Nos. 25 and 26.—October Term, 1941.

National Labor Relations Board, Petitioner, 25 *vs.* Virginia Electric and Power Company.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
National Labor Relations Board, Petitioner, 26 *vs.* The Independent Organization of Employees of the Virginia Electric and Power Company.	

[December 22, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

Upon the usual proceedings[1] had pursuant to section 10 of the National Labor Relations Act[2] the Board made substantially the following findings of fact:

For years prior to the events in this case the Virginia Electric and Power Company (hereinafter called the Company) was hostile to labor organizations. From 1922, when a strike was unsuccessful by a nationally affiliated union,[3] until the formation of the Independent Organization of Employees (hereinafter called the Independent) in 1937 there was no labor organization among its em-

[1] These proceedings were instituted on charges and amended charges filed in 1937 and 1938 by the Transport Workers Union of America, affiliated with the Congress of Industrial Organizations, by the Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America, and by the International Brotherhood of Electrical Workers, the latter two being affiliated with the American Federation of Labor. The complaint, as amended, charged that the employer, respondent in No. 25, had engaged in unfair labor practices within the meaning of section 8(1), (2), and (3) of the Act; 29 U. S. C. § 158(1), (2), and (3). The Independent Organization of Employees of the Virginia Electric and Power Company, respondent in No. 26, was allowed to intervene with respect to the 8(2) charge, was represented by counsel and participated throughout the proceedings.

[2] 49 Stat. 449; 29 U. S. C. § 151 *et seq.*

[3] Amalgamated Association of Street, Electrical Railway, and Motor Coach Employees of America.

ployees. Shortly after the enactment of the National Industrial Recovery Act in 1933, Holtzclaw, the president of the Company, spoke to the employees and stated that any organization among them was "entirely unnecessary". Until his death in May 1937 the Company utilized the services of one Walters, an employee of the Railway Audit and Inspection Company who prior to the effective date of the Act admittedly furnished a report on the labor activity of the employees to the Company. In 1936 Bishop, Superintendent of Transportation in Norfolk, interrogated employees concerning union activities. On April 26, 1937, shortly after the Act was upheld,[4] and an A. F. of L. organizer had appeared, the Company posted a bulletin[5] throughout its operations appealing to the employees to bargain with the Company directly without the intervention of an "outside" union, and thereby coerced its employees. In response to this bulletin several requests for increased

[4] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, and companion cases.

[5] "April 26, 1937.

To the Employees of the Company:

As a result of recent national labor organization activities and the interpretation of the Wagner Labor Act by the Supreme Court, employees of companies such as ours may be approached in the near future by representatives of one or more such labor organizations to solicit their membership. Such campaigns are now being pressed in various industries and in different parts of the country and strikes and unrest have developed in many localities. For the last fifteen years this company and its employees have enjoyed a happy relationship of mutual confidence and understanding with each other, and during this period there has not been any labor organization among our employees in any department, so far as the management is aware. Under these circumstances, we feel that our employees are entitled to know certain facts and have a statement as to the Company's attitude with reference to this matter.

The Company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the company. On the other hand, we feel that it should be made equally clear to each employee that it is not at all necessary for him to join any labor organization, despite anything he may be told to the contrary. Certainly, there is no law which requires or is intended to compel you to pay dues to, or to join any organization.

This Company has always dealt with its employees in full recognition of the right of every individual employee, or group of employees, to deal directly with the Company with respect to matters affecting their interests. If any of you, individually or as a group, at any time, have any matter which you wish to discuss with us, any officer or department head will be glad, as they always have been, to meet with you and discuss them frankly and fully. It is our earnest desire to straighten out in a friendly manner, as we have done in the past, whatever questions you may have in mind. It is reasonable to believe that our interests are mutual and can best be promoted through confidence and cooperation.

(signed) J. G. HOLTZCLAW,
President."

wages and better working conditions were received.[6] The Company decided to withhold action on those requests and directed its employees to select representatives to attend meetings at which Company officials would speak on the Wagner Act. These representatives met in Norfolk and Richmond on May 24 and were addressed by high Company officials who read identical speeches[7] stressing the desirability of forming a bargaining agency. At the Richmond meeting it was announced that any wage increase granted would be retroactive to June 1. By the substance of the speeches and the mechanics of the meetings the Company gave impetus to and as-

---

[6] Included in those requests was a petition from a majority of the Norfolk transportation employees which was the result of two meetings on Company property during working hours on May 11, 1937, in response to unsigned notices placed in the dispatcher's office by A. R. Ruett, a car operator. Both Ruett, and R. E. Elliott, who assumed the leadership in those meetings, testified that Superintendent Bishop had urged them to form an inside organization after warning them against the C. I. O. Bishop denied this, and the Board made no finding.

[7] "A substantial number of its employees representing various departments and various occupations have approached the Company with the request that the Company consider with them the matter of their working conditions and wages. In other words, they have requested collective bargaining. The Company's position with respect to this was recently stated in a posted bulletin.

"In a company such as ours, if an individual operator, for example, should ask for himself better working conditions or wages, this Company could not comply with his request without also making the same concessions to other similar operators. In such a case the operator who appealed individually would, as a practical matter, be bargaining collectively for all of his group, which is not the logical procedure.

"This Company is willing to consider the requests mentioned above but feels that, in fairness to all of its employees and to itself, it should at the same time consider other groups who have not yet come to it. If the approaching negotiations are to be intelligent and fair to all properly concerned, they should be conducted in an orderly way, and all interested groups should be represented in these discussions by representatives of their own choosing, as provided in the Wagner National Labor Relations Act, which provides as follows:

> 'SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.'

"The Wagner Act applies only to employees whose work is in or directly affects interstate commerce and to companies engaged in interstate commerce. Counsel for this Company advise us that in their opinion the provisions of the Act do not apply to local transportation employees, to gas employees in Norfolk, or to certain strictly local employees of the light and power department. In spite of this, the Company wants to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of its employees and that no employee will be discriminated against because of any labor affiliations he desires to make.

"The petitions and representations already received indicate a desire on the part of these employees at least to do their own bargaining, and we are taking this means of letting you know our willingness to proceed with such

sured the creation of an "inside" organization and coerced its employees in the exercise of their rights guaranteed by section 7 of the Act. Meetings, arranged with the cooperation of Company supervisors, on Company property and, in some instances on Company time, followed, at which the May 24 speeches were reported to the men who voted to form an "inside" organization and selected committees for that purpose. These committees met on Company property until June 15 when the constitution of the Independent was adopted.

While the Independent was in the process of organization, Edwards, a supervisor, kept meetings of a rival C.I.O. union under surveillance and warned employees that they would be discharged for "messing with the C.I.O." On June 1 Manr, a member of the C.I.O. who had openly protested against an "inside" union at one of the May 11 meetings (see note 6 *ante*) attended by Superintendent Bishop's son, Warren, was discharged for union activities.

On June 17 application cards for the Independent were distributed throughout the entire system of the Company and many were signed on Company property and time. Within three weeks after the adoption of the constitution of the Independent a majority of the employees filled out application cards. By July 13 the organization was complete and permanent committeemen had been elected. A majority of those committeemen had been present at the May 24 meetings. On July 19 the Independent notified the Company that it represented a majority of the employees and submitted a proposed contract. Negotiations were begun on July 30 and agreement was reached by midnight of the following day. The contract was formally executed on August 5, and provided, *inter alia*, for a closed shop, a check-off, and a wage increase. On August 20 the Company paid $3,784.50 to the Independent although it had not yet deducted that entire amount from the employees' wages.

---

bargaining in an orderly manner. In order to progress, it would seem that the first step necessary to be taken by you is the formation of a bargaining agency and the selection of authorized representatives to conduct this bargaining in such an orderly manner.

"The Wagner Labor Act prohibits a company from 'dominating or interfering with the formation or administration of any labor organization or contribute (*sic*) financial or other support to it.'

"In view of your request to bargain directly with the Company and, in view of your right to self-organization as provided in the law, it will facilitate negotiations if you will proceed to set up your organization, select your own officers and adviser, adopt your own by-laws and rules, and select your representatives to meet with the Company officials whenever you desire."

On November 4, the date upon which the closed shop provision became effective, the Company discharged two employees, Staunton and Elliott, because they refused to join the Independent. In March, 1938, it discharged another employee, Harrell, for his membership and activity in an outside union.

Upon the basis of these findings and the entire record in the case the Board concluded that the Company had committed unfair labor practices within the meaning of section 8(1), (2) and (3) of the Act. Its order directed the Company to cease and desist from its unfair labor practices and from giving effect to its contract with the Independent, to withdraw recognition from and disestablish that organization, to reinstate with back pay the four wrongfully discharged employees, to reimburse each of its employees who was a member of the Independent in the amount of the dues and assessments checked off his wages by the Company on behalf of the Independent, and to post appropriate notices.

The Company and the Independent filed separate petitions in the court below to review and set aside the Board's order. The Board answered and requested enforcement of its order against the Company. The court below denied enforcement to any part of the Board's order, completely setting it aside.[8] We granted the petition for writs of certiorari because the case was thought to present important questions in the administration of the Act. 312 U. S. 677.

The Company is engaged in the business of generating and distributing electrical energy in eastern Virginia and north-eastern North Carolina. It also furnishes illuminating gas to customers in the vicinity of Norfolk, Virginia, and operates transportation services in Richmond, Norfolk, Portsmouth and Petersburg. It does not here renew the contention, correctly decided against it by the court below,[9] that the jurisdiction of the Board does not extend to its employees in the gas and transportation departments.

Domination of the Independent

The command of section 10(e) of the Act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive" precludes an independent consideration of the facts.

[8] Virginia Electric & Power Co. *v.* National Labor Relations Board, 115 F. 2d 414.

[9] *Ibid.*, 415-416.

Bearing this in mind we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act. But here the Board's conclusion that the Independent was a Company dominated union seems based heavily upon findings which are not free from ambiguity and doubt. We believe that the Board, and not this Court, should undertake the task of clarification.

The Board specifically found that the bulletin of April 26 and the speeches of May 24 "interfered with, restrained and coerced" the Company's employees in the exercise of their rights guaranteed by section 7 of the Act. The Company strongly urges that such a finding is repugnant to the First Amendment. Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. For "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 78.

If the Board's order here may fairly be said to be based on the totality of the Company's activities during the period in question, we may not consider the findings of the Board as to the coercive effect of the bulletin and the speeches in isolation from the findings as respects the other conduct of the Company. If the Board's ultimate conclusion is based upon a complex of activities, such as the anti-union background of the Company, the activities of Bishop, Edwards' warning to the employees that they would be discharged for "messing with the C.I.O.", the discharge of Mann, the quick

formation of the Independent, and the part which the management may have played in that formation, that conclusion would not be vitiated by the fact that the Board considered what the Company said in conjunction with what it did. The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees the Board has a right to look at what the Company has said as well as what it has done.

But from the Board's decision we are far from clear that the Board here considered the whole complex of activities, of which the bulletin and the speeches are but parts, in reaching its ultimate conclusion with regard to the Independent. The Board regarded the bulletin on its face as showing a marked bias against national unions by implying that strikes and unrest are caused by the organizational campaigns of such bodies, by stressing the "happy relationship of mutual confidence and understanding" prevailing in the absence of organization since the defeat of the Amalgamated in 1922, and by emphasizing the negative "right" of the employees to refrain from exercising their rights guaranteed under the Act after paying "lip service" to those rights. Summing up its conclusions the Board said: "We interpret the bulletin as an appeal to the employees to bargain with the respondent directly, without the intervention of any 'outside' union. We find that by posting the bulletin the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

The Board was of the view that the speeches delivered in the meetings of May 24 provided the impetus for the formation of a system-wide organization, that they re-emphasized the Company's distaste for "outside" organizations by referring to the bulletin, and that, after quoting the provision of the Act forbidding employer domination of labor organizations, they suggested that the employees select their "own" officers, and adopt their "own" by-laws and rules. The Board's finding was: "We find that at the May 24 meetings the respondent urged its employees to organize and to do so independently of 'outside' assistance, and that it thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board

raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. The bulletin and the speeches set forth the right of the employees to do as they please without fear of retaliation by the Company. Perhaps the purport of these utterances may be altered by imponderable subtleties at work which it is not our function to appraise. Whether there are sufficient findings and evidence of interference, restraint, coercion, and domination without reference to the bulletin and the speeches, or whether the whole course of conduct evidenced in part by the utterances was aimed at achieving objectives forbidden by the Act, are questions for the Board to decide upon the evidence.

Here we are not sufficiently certain from the findings that the Board based its conclusion with regard to the Independent upon the whole course of conduct revealed by this record. Rather it appears that the Board rested heavily upon findings with regard to the bulletin and the speeches the adequacy of which we regard as doubtful. We therefore remand the cause to the Circuit Court of Appeals with directions to remand it to the Board for a redetermination of the issues in the light of this opinion. We do not mean to intimate any views of our own as to whether the Independent was dominated or suggest to the Board what its conclusion should be when it reconsiders the case. Since the Board rested the remainder of its order in large part on its findings with respect to the domination of the Independent, we do not at this time reach the other parts of the Board's order, including the command that the checked-off dues and assessments should be refunded.

Reversed and remanded.

Mr. Justice ROBERTS and Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.